



**REPUBLIC OF THE PHILIPPINES
SANDIGANBAYAN
QUEZON CITY**

THIRD DIVISION

**PEOPLE OF THE
PHILIPPINES,**

**THE
Plaintiff,**

**Criminal Case No. SB-19-
CRM-0099**

For: Violation of Section 3(e),
Republic Act (R. A.) No.
3019, as amended

- versus -

**ORVILLE FUA y ANO-OS, et
al.,**

Present:

Accused.

CABOTAJE-TANG, P.J.,
Chairperson
FERNANDEZ, B., J. and
MORENO, R., J.

Promulgated:

JUNE 30, 2020

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RESOLUTION

CABOTAJE-TANG, PJ:

For resolution is the *Omnibus Motion* dated February 11, 2020 filed by accused Merlyn E. Lu.¹

In her subject omnibus motion, accused Lu prays for the dismissal of the case against her on the grounds of prescription of the offense, inordinate delay and lack of

¹ pp. 934-938, Record

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preliminary investigation. In addition, she claims that her alleged participation does not constitute an overt act.

Accused Lu claims that she was not able to participate in the preliminary investigation before the Office of the Ombudsman because she was not notified of the case against her which violates her right to due process. Thus, the case should be dismissed or held in abeyance and that the Court direct the Office of the Ombudsman to conduct a preliminary investigation insofar as she is concerned. Accused Lu further argues that due to the alleged lack of notice, it is as if not complaint was filed against her as of this date; hence, the case should be dismissed on the ground of prescription of the offense.

Further, accused Lu argues that there was inordinate delay in resolving her case because the incident occurred on April 4, 2004, or about fifteen (15) years had already lapsed during which period she was in a "serious disadvantage due to memory gap, loss of evidence for her defense, testimonial and documentary, and was publicly humiliated." Finally, citing **Macapagal-Arroyo vs. People**,² accused Lu claims that her alleged participation does not constitute an overt act.³

In its *Opposition (to accused Merlyn Lu's Omnibus Motion to Dismiss)* dated February 28, 20[20], the prosecution claims that the offense has not yet prescribed because the complaint was filed with the Office of the Ombudsman for preliminary investigation on September 23, 2016, or after the lapse of twelve (12) years and four (4) months from the commission of the offense charged. The prosecution also stresses that the Office of the Ombudsman's Resolution dated July 12, 2017 shows that the order to file counter-affidavit addressed to accused Lu and other private respondents were returned unserved either because the addresses were either unknown or no such company exists at the given address. Thus, the prosecution contends that there was no denial of due process because accused Lu was given the opportunity to be heard;

² 797 SCRA 241 (2016)

³ pp. 2-3, Omnibus Motion; pp. 935-936, Record



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and, that what is prohibited is the absolute lack of opportunity to be heard. At any rate, the prosecution claims that accused Lu already entered her plea in this case; hence, she already waived her right to a preliminary investigation. Moreover, it points out that the prayer for the conduct of a preliminary investigation is nothing more than a motion for reinvestigation, which is a prohibited motion under the Revised Guidelines for Continuous Trial of Criminal Cases. Anent the issue on the alleged inordinate delay, the prosecution claims that the alleged delay was necessary and reasonable.

Finally, the prosecution argues that the Information against accused Lu sufficiently alleges the overt act she performed in pursuance of the conspiracy. As the Supreme Court has consistently held, the Information need only to state the ultimate facts.⁴

RULING OF THE COURT

The Court finds the subject omnibus motion devoid of merit.

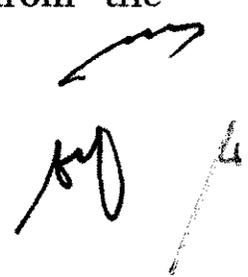
I. The offense charged has not prescribed.

The accused are charged with a violation of R.A. No. 3019. Section 11 thereof, as amended, provides that "all offenses punishable under this Act shall prescribe in 15 years."⁵

In this case, accused Lu, together with her co-accused, is charged with a violation of Section 3(e) of R.A. No. 3019 allegedly committed on May 7, 2004. The complaint against her was filed before the Office of the Ombudsman on September 23, 2016, or after twelve (12) years from the

⁴ p. 7, Opposition; p.953 Record.

⁵ This is the period of prescription applicable to the accused in this case.

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purported commission of the alleged offense. Clearly, the offense has not prescribed.

II. There is no violation of accused Lu's right to due process.

Section 4, Rule II of the Ombudsman Administrative Order No. 07 provides:⁶

RULE II
Procedure in Criminal Cases

... ..

SECTION 4. Procedure. — The preliminary investigation of cases falling under the jurisdiction of the Sandiganbayan and Regional Trial Courts shall be conducted in the manner prescribed in Section 3, Rule 112 of the Rules of Court, subject to the following provisions:

a) If the complaint is not under oath or is based only on official reports, the investigating officer shall require the complainant or supporting witnesses to execute affidavits to substantiate the complaints.

b) After such affidavits have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondent to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.



⁶ emphasis supplied



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c) If the respondent does not file a counter-affidavit, the investigating officer may consider the comment filed by him, if any, as his answer to the complaint. In any event, the respondent shall have access to the evidence on record.

d) No motion to dismiss shall be allowed except for lack of jurisdiction. Neither may a motion for a bill of particulars be entertained. If respondent desires any matter in the complainant's affidavit to be clarified, the particularization thereof may be done at the time of clarificatory questioning in the manner provided in paragraph (f) of this section.

e) If the respondent cannot be served with the order mentioned in paragraph 6 hereof, or having been served, does not comply therewith, the complaint shall be deemed submitted for resolution on the basis of the evidence on record.

... ..

On the other hand, Section 3, Rule 112 of the Rules of Court provides:

**RULE 112
Preliminary Investigation**

... ..

Section 3. Procedure. — The preliminary investigation shall be conducted in the following manner:

... ..

(d) If the respondent cannot be subpoenaed, or if subpoenaed, does not submit counter-affidavits within the ten (10) day period, the investigating officer shall resolve the complaint based on the evidence presented by the complainant.

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... ..

In this case, the Office of the Ombudsman sent an order to accused Lu for her to submit her counter-affidavit. The said order, however, was returned with notation: "addressee unknown." Despite the return of the order, the copies of the Resolution dated July 12, 2017⁷ and Order dated February 28, 2018⁸ were sent to accused Lu through registered mail in her residential address and the address of Mangopina Trading Co.⁹

Plainly, attempts to serve the order to file counter-affidavit were made on accused Lu. However, the same proved futile; hence, the Office of the Ombudsman properly proceeded and resolved the case. What bears underscoring is that the preliminary investigation is not part of trial and is conducted only to establish whether probable cause exists. Consequently, it is not subject to the same due process requirements that must be present during trial.¹⁰ The reason therefor was explained by the Supreme Court in **Estrada vs. Office of the Ombudsman**,¹¹ in that preliminary investigation does not finally adjudicate the rights and obligations of parties:

Furthermore, owing to the initiatory nature of preliminary investigations, the "technical rules of evidence should not be applied" in the course of its proceedings, keeping in mind that "the determination of probable cause does not depend on the validity or merits of a party's accusation or defense or on the admissibility or veracity of testimonies presented." Thus, in *Estrada v. Ombudsman (Estrada)*, the Court declared that since a preliminary investigation does not finally adjudicate the rights and obligations of parties, "probable cause can be established with hearsay

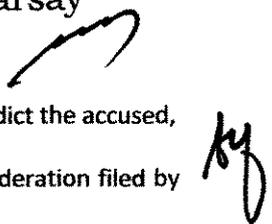
⁷ This resolution was issued by the Office of the Ombudsman finding probable cause to indict the accused, including accused Lu, in this case; pp. 9-35

⁸ This order was issued by the Office of the Ombudsman denying the motion for reconsideration filed by the accused in this case; pp. 39-45, Record.

⁹ pp. 38 and 48, Record

¹⁰ **Binay vs. Office of the Ombudsman**, G.R. Nos. 213957-58, August 7, 2019

¹¹ G.R. Nos. 212761-62, 213473-74, 213538-39, July 31, 2018



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evidence, as long as there is substantial basis for crediting the hearsay."

Time and again, it has been said that the touchstone of due process is the opportunity to be heard¹² which was undeniably afforded to accused Lu in this case.

At any rate, accused Lu was already arraigned on February 4, 2020¹³ and entered a plea of "not guilty." Thus, she is deemed to have waived her right to a preliminary investigation.

The settled rule is that when an accused pleads to the charge, he is deemed to have waived the right to preliminary investigation and the right to question any irregularity that surrounds it.¹⁴

III. There was no inordinate delay in the conduct of preliminary investigation.

Inordinate delay in the resolution and termination of a preliminary investigation violates the accused's right to due process and the speedy disposition of cases, and may result in the dismissal of the case against the accused.¹⁵

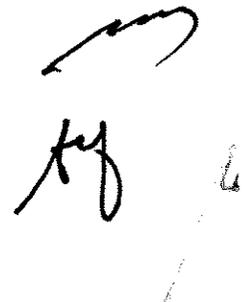
The determination of whether the delay was inordinate is not through mere mathematical reckoning but through the examination of the facts and circumstances surrounding the case. Courts should appraise a reasonable period from the point of view of how much time a competent and independent public officer would need in relation to the complexity of a given case. If there has been delay, the prosecution must be

¹² 787 SCRA 354 (2016)

¹³ pp. 920, Record

¹⁴ *Cruz vs. People*, 564 SCRA 99 (2008)

¹⁵ *Cagang v. Sandiganbayan*, 875 SCRA 374 (2018)

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able to satisfactorily explain the reasons for such delay and that no prejudice was suffered by the accused as a result.¹⁶

In this case, the Court finds that there was no violation of accused Lu's rights to due process and to a speedy disposition of her case.

The record shows that the FIO-OMB filed a complaint against the accused before the Office of the Ombudsman on September 23, 2016.¹⁷ Except for accused Lu, the other accused filed their separate counter-affidavits from November 4, 2016 to December 5, 2016. The Office of the Ombudsman found probable cause to indict the accused for a violation of Section 3(e) of R. A. No. 3019 in its Resolution dated July 12, 2017.¹⁸ Accused Fua, Tomogsoc, Marchan, Jumawan, Jr. and Castillon filed their respective motions for reconsideration on September 19, 2017 and accused Monte and Jumadla, Jr. filed theirs on September 20, 2017. The said motions for reconsideration were denied by the Office of the Ombudsman in its Order dated February 28, 2018, and approved by then Ombudsman Morales on March 27, 2018.¹⁹ The same Information was approved anew by Ombudsman Martires on April 5, 2019. Thereafter, or on May 17, 2019, the Information dated July 12, 2017 was filed with the Court.

In this case, the prosecution offers the following explanation for the delay in the filing of the Information, thus:

12. While the Information was indeed dated 12 July 2017, the same was signed by then Ombudsman Conchita Carpio Morales on 2 May 2018, towards the end of her term of office. Notably, with the appointment of the present Ombudsman Samuel R. Martires, who took office in July 2018, the cases then pending with the Office of the Ombudsman, including the case against accused-movant, were all reviewed anew by his legal staff before those cases were acted upon. In the

¹⁶ *Cagang v. Sandiganbayan*, *supra*

¹⁷ p. 49, Record

¹⁸ pp. 9-38, Record

¹⁹ pp. 39-48, Record

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present case, while the Information was already signed by Ombudsan Morales, it was well within the mandate of Ombudsman Martires to review the same before it was filed with the Sandiganbayan. Thus, it would necessarily result in delay, which is reasonable under the circumstances.

The above circumstances negate any showing that the prosecution deliberately delayed the proceedings to gain an advantage or for other impermissible reasons. The delay or the period of about three (3) years was reasonable being part of the ordinary processes of justice.

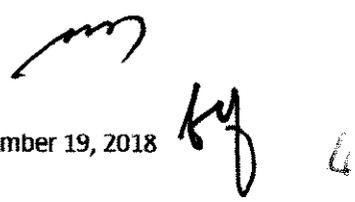
Clearly, the proceedings before the Office of the Ombudsman was not attended by vexatious, capricious, and oppressive delays.

The concept of speedy disposition is consistent with delays and depends upon the circumstances. What the Constitution prohibits are unreasonable, arbitrary and oppressive delays which render rights nugatory.²⁰

Further, it cannot be said that accused Lu was unduly prejudiced by the "delay." Accused Lu merely claims that the fifteen (15) years that had lapsed from the occurrence of the event until the present had placed her in a serious disadvantage due to memory gap, loss of evidence for her defense, testimonial and documentary and was publicly humiliated. However, she failed to point to any evidence, documentary or testimonial that has been lost or can no longer be secured due to their passage of time.

IV. The Information sufficiently alleges accused Lu's participation in the alleged commission of the offense charged.

²⁰ Escobar vs. People, G.R. Nos. 228349, 228353 and 229895-96, September 19, 2018



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Invoking **Macapagal-Arroyo vs. People**,²¹ accused Lu claims that the allegation in the Information as to her alleged participation does not constitute an overt act because “to be considered part of the conspiracy, each of the accused must be shown to have performed at least an overt act in pursuance or in furtherance of conspiracy.

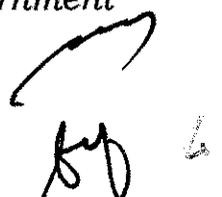
The Court finds the claim bereft of merit.

The **Macapagal-Arroyo case** involves the denial of therein petitioner’s demurrer to evidence where the Supreme Court, among others, declared that “the prosecution did not properly allege and prove the existence of conspiracy among GMA, Aguas and Uriarte.” The Supreme Court held:

It is in this regard that the Sandiganbayan gravely abused its discretion amounting to lack or excess of its jurisdiction. To start with, its conclusion that GMA had been the mastermind of plunder was plainly conjectural and outrightly unfounded considering that the information did not aver at all that she had been the mastermind; hence, the Sandiganbayan thereby acted capriciously and arbitrarily. In the second place, the treatment by the Sandiganbayan of her handwritten unqualified "OK" as an overt act of plunder was absolutely unwarranted considering that such act was a common legal and valid practice of signifying approval of a fund release by the President. Indeed, pursuant to *People v. Lizada, supra*, an act or conduct becomes an overt act of a crime only when it evinces a causal relation to the intended crime because the act or conduct will not be an overt act of the crime if it does not have an immediate and necessary relation to the offense.

In this case, the accused public officers are charged with a violation of Section 3(e) of R.A. No. 3019, in conspiracy with accused Milne and Lu, who are representatives of Mangopina Trading Company, Inc., in causing “*undue injury to the government*

²¹ *supra* note 2



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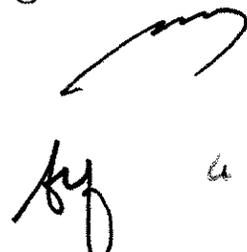
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*and give unwarranted benefits, privilege, and advantage to Mangopina and/or accused Milne and Lu, by entering into a contract or transaction in behalf of the government with Mangopina for the purchase of Two Thousand Ninety-Six (2,096) bottles of MRG Liquid Fertilizers at P1,550.00 per bottle and One Thousand Two Hundred Fifty-Eight (1,258) bags of DEL GRO Super Foliar Fertilizers at P1,550.00 per bag or a total of **Four Million Nine Hundred Ninety Thousand Seven Hundred Fifty-Two Pesos (P4,990,752.00)** after tax, as reflected under DV No. 300-0405-004 dated May 7, 2004, notwithstanding the irregularities and anomalies attending the procurement process, accused knowing fully well that said transaction was in violation of Republic Act No. 9184 (The Government Procurement Reform Act) and its Implementing Rules and Regulations, including but not limited to the premature issuance of the Purchase Request; reference to brand names; lack of performance security bond; and lack of proof of the project's implementation, to the damage and prejudice of the government in the aforesaid amount of **P4,990,752.00.**"*

A conspiracy indictment need not, of course, aver all the components of conspiracy or allege all the details thereof, like the part that each of the parties therein performed, the evidence proving the common design or the facts connecting all the accused with one another in the web of the conspiracy. Neither is it necessary to describe conspiracy with the same degree of particularity required in describing a substantive offense. It is enough that the indictment contain a statement of the facts relied upon to be constitutive of the offense in ordinary and concise language, with as much certainty as the nature of the case will admit, in a manner that can enable a person of common understanding to know what is intended, and with such precision that the accused may plead his acquittal or conviction to a subsequent indictment based on the same facts. It is said, generally, that an indictment may be held sufficient "if it follows the words of the statute and reasonably informs the accused of the character of the offense he is charged with conspiring to commit, or, following the language of the statute, contains a sufficient statement of an overt act to effect the object of the conspiracy, or alleges both

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the conspiracy and the contemplated crime in the language of the respective statutes defining them.²²

Moreover, the prosecution is yet to present its evidence to prove the alleged conspiracy unlike in the **Macapagal-Arroyo** case.

WHEREFORE, the Court **DENIES** the Omnibus Motion dated February 11, 2020, filed by accused Merlyn E. Lu, for lack of merit.

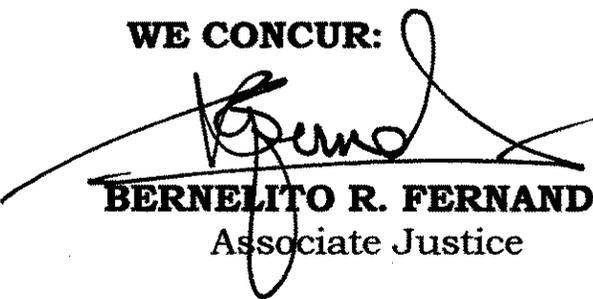
SO ORDERED.

Quezon City, Metro Manila

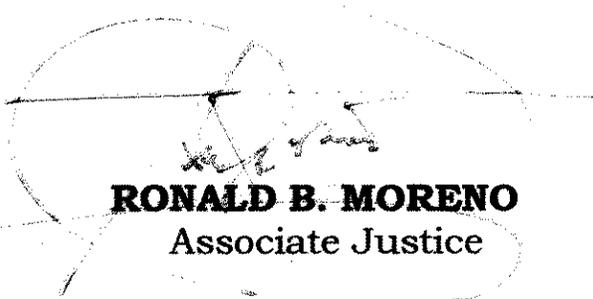

AMPARO M. CABOTAJE-TANG

Presiding Justice
Chairperson

WE CONCUR:


BERNELITO R. FERNANDEZ

Associate Justice


RONALD B. MORENO

Associate Justice

²² *Francisco vs. People*, 592 SCRA 672 (2009)